

## HR Weekly Podcast

10/26/2007

Today is October 26, 2007, and welcome to the HR Weekly Podcast from the State Office of Human Resources. This week's topic concerns the Family and Medical Leave Act or FMLA and the waiver of rights under the FMLA.

In 2005, the Fourth Circuit Court of Appeals ruled in *Taylor v. Progress Energy* that employers cannot enforce a release of claims under the FMLA unless the release has been approved by a court or the United States Department of Labor. The court held that, based upon an FMLA regulation, the plaintiff's waiver of her FMLA claims contained in a severance agreement was invalid since it was not approved by a court or the Department of Labor. The specific regulation cited states: "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."

Following the 2005 decision by the Fourth Circuit, Progress Energy petitioned for a rehearing and argued that the regulation cited by the court only barred prospective releases of FMLA claims. The Secretary of Labor then filed a brief supporting Progress Energy in its petition and stated that the Circuit Court had misread the regulation.

The Fourth Circuit granted Progress Energy's motion, vacated its original decision, and ordered a rehearing to also consider the arguments raised by the Department of Labor. On July 3, 2007, the court disagreed with the Department of Labor's interpretation that the regulation prohibits only the prospective waiver of FMLA rights by indicating that the word "waive" has retrospective connotations. Moreover, the court opined that the regulation prohibits both the prospective and retrospective waiver of any FMLA rights unless the waiver has the prior approval of the Department of Labor or a court. The court reasoned that, since the regulation specifically states "rights under the FMLA," it refers to all rights under FMLA, including the right to file an action or a claim for violation of FMLA.

For employers, the waiving of FMLA rights by employees might arise when settling or resolving employment disputes even when they do not involve FMLA claims or violations. This issue would also apply to state agencies and could become a concern when resolving a grievance or an appeal through a settlement agreement. If the general release contained in a settlement agreement is too broad in its scope to possibly include a waiver of FMLA rights by the employee, it would be contrary to the rulings of the Fourth Circuit Court of Appeals and the language cited in the federal regulation. Employers that include FMLA waivers in releases run the risk of having the entire release invalidated, potentially exposing themselves to FMLA claims as well as other employment litigation.

As a result of the court's decision, agencies are encouraged to consult with legal counsel before drafting or signing any settlement agreements containing a release by the employee. If you have any questions concerning this latest decision by the Fourth Circuit Court of Appeals, please contact your agency's legal counsel or your OHR consultant at 737-0900.

Thank you.